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No. 85-1033

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioners,

v.

CAROLYN ROBINSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

IS A CRIMINAL RESTITUTION ORDER DISCHARGEABLE AS A DEBT IN BANKRUPTCY?

LIST OF ALL PARTIES

In addition to petitioner John J. Kelly, Connecticut Chief State's Attorney, the other petitioners are: Director, Officer of Adult Probation; Commissioner, Department of Income Maintenance; and Commissioner, Department of Administrative Services. The sole respondent is Carolyn Robinson.

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OPINIONS BELOW

The opinion of the United States Bankruptcy Court for the District of Connecticut, which was adopted by the United States District Court for the District of Connecticut, is reported at 45 B.R. 423 (Bankr. D. Conn. 1984), and is reprinted in Appendix A to the Petition, pages 1A–6A. The bankruptcy and district courts relied heavily on the opinion in

In re Pellegrino, which is reported at 42 B.R. 129 (Bankr. D. Conn. 1984), and is reprinted in Appendix B to the Petition, pages 7A–27A. The opinion of the United States Court of Appeals for the Second Circuit is reported at 776 F.2d 30 (2d Cir. 1985), and is reprinted in Appendix C to the Petition, pages 28A–54A. This Court's grant of certiorari is reported at 106 S.Ct. 1181 (1986).

JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on October 29, 1985. No petitions for rehearing or requests for an extension of time within which to file a petition for certiorari were filed. The petition for certiorari was filed on December 13, 1985 and granted by this Court on February 24, 1986. This Court has jurisdiction to review by writ of certiorari the judgment of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case primarily involves the following statutes: 11 U.S.C. § 101(4), (11), concerning the definition of "claim" and "debt," 11 U.S.C. § 105, concerning the injunctive powers of the bankruptcy court, 11 U.S.C. § 362, concerning the automatic stay, 11 U.S.C. § 523, concerning exceptions to discharge, and 11 U.S.C. § 727(b), concerning the effect of discharge. These statutes are set out verbatim at pages v–xxi of the Petition. (Pet.) The petitioners also will refer to 11 U.S.C. § 524(a), concerning the effect of discharge, 11 U.S.C. § 525, concerning the prohibition of discrimination against bankrupts, 11 U.S.C. § 35a (repealed 1979) of the 1898 Bankruptcy Act, concerning the nondischargeability of certain civil obligations, 11 U.S.C. § 93j (repealed 1979), concerning proof and allowance of claims, 11 U.S.C. § 103a (repealed 1979), concerning provability of debts, and Conn. Gen. Stat.

§§ 53a-30–33, concerning the probation system in Connecticut. These statutes are set out in the Appendix to this Brief (App. to Br.). Other statutes of lesser import are cited in the argument. Citations are to the most recent version of the statute unless otherwise noted.

STATEMENT OF THE CASE

This case raises the question of whether a federal bankruptcy court has any authority to nullify a valid final judgment of a state criminal court and thus allow a convicted criminal, sentenced to make restitution, to escape justice by the simple expedient of listing the restitution order as a dischargeable debt on her bankruptcy petition.

The facts are not in dispute.[1] On July 28, 1980, the respondent, Carolyn Robinson, pleaded guilty in Connecticut Superior Court to the crime of larceny in the second degree. *See* Conn. Gen. Stat. § 53a-123 (1979). The conviction arose out of Robinson's wrongful receipt of $9,932.95 in public assistance benefits from the petitioner Connecticut Department of Income Maintenance (CDIM) while simultaneously receiving Social Security benefits. On November 14, 1980, a state superior court judge sentenced Robinson to a prison term of not less than one year nor more than three years, execution of which was suspended, and to probation for five years on the condition that she make restitution to the State of Connecticut in the amount of $9,932.95 at the rate of $100.00 per month, commencing January 16, 1981. A payment at that rate commencing at that time meant that the total amount that Robinson would have to restore over the five year probationary period amounted to $5,800.00.

On February 5, 1981, Robinson filed a voluntary petition for bankruptcy under Chapter 7 in the United States Bankruptcy Court for the District of Connecticut. *See* 11 U.S.C. § 701 et seq. The petition contained a schedule of creditors that listed, among others, CDIM as having a claim of $6,000 for public assistance and the petitioner Connecticut

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[1] Except where otherwise noted, the following statement of facts derives from the statement of facts contained in the Second Circuit and bankruptcy court opinions. *See* Appendix to Petition (App. to Pet.) at 3A–4A, 30A–33A.

Office of Adult Probation (COAP) as having a claim of $9,932.95 for restitution. On February 20, 1981, the bankruptcy court notified both CDIM and COAP of Robinson's Chapter 7 petition, but neither agency filed any form of objection to discharge by the April 27, 1981 deadline for doing so. On May 14, 1981, the bankruptcy court issued an order discharging Robinson from all dischargeable debts, declaring null and void all existing or future judgments that purported to hold Robinson personally liable with respect to any such dischargeable debts, and enjoining all creditors whose debts were thereby discharged from thereafter endeavoring to collect such debts.

Up until May 4, 1981, Robinson had made restitution payments totaling $450. After receiving her bankruptcy discharge on May 14, 1981, Robinson notified COAP of her intent to discontinue making payments and did in fact cease making them.

The petitioner state agencies took no action until February, 1984, when COAP wrote Robinson a letter requesting that she resume payment. At about the same time Robinson filed an adversary proceeding in United States Bankruptcy Court for the District of Connecticut, naming as defendants the Commissioner of CDIM, the Commissioner of the Connecticut Department of Administrative Services, the Director of COAP, and the Connecticut Chief State's Attorney. Robinson sought a declaration that the May 14, 1981 discharge order had discharged her restitution obligations to COAP and CDIM, an injunction prohibiting the named state officials from taking any steps to obtain further restitution payments, a finding that the state officials were in contempt of court, and an award of attorney's fees under 42 U.S.C. § 1988.

On March 19, 1984, COAP wrote Robinson a second letter requesting a $100 payment by April 1, 1984. J.A. at 23A. Approximately one week later Robinson filed a motion in a bankruptcy court for a preliminary injunction against state restitution enforcement efforts. J.A. at 41A. On April 2, 1984, Robinson nevertheless made an additional $100

payment, bringing her total restitution payments to $550. J.A. at 44A. On the next day, the bankruptcy court denied the motion for a preliminary injunction. J.A. at 42A. The state, on April 16, 1984, thereupon served Robinson with a Notice to Appear for Violation of Probation premised on her failure to pay the accumulated arrearage. J.A. at 43A. With the agreement of the state, Robinson then obtained in state superior court a stay of the probation violation proceedings pending final disposition of the federal lawsuit. J.A. at 46A.

Following a brief trial on the merits later in 1984, the bankruptcy court entered a Memorandum and Proposed Order denying all relief that Robinson sought. Relying on its decision in the companion case of *In re Pellegrino*, 42 B.R. 129 (Bankr. D. Conn. 1984), the bankruptcy court concluded that a criminal restitution order does not constitute a bankruptcy "debt" within the meaning of 11 U.S.C. § 101(11) and that, even if it does, such a debt is a "penalty" and thus exempt from discharge under 11 U.S.C. § 523(a)(7). The district court adopted the proposed order and judgment entered for the state officials.

Upon appeal by Robinson, the United States Court of Appeals for the Second Circuit reversed. The court's opinion observed that a majority of the courts considering the issue have held that a criminal restitution obligation is not a debt under the Bankruptcy Code and that only one decision, *In re Brown*, 39 B.R. 820 (Bankr. M.D. Tenn. 1984), had held to the contrary. App. to Pet. at 35A–36A, 38A. In adopting what was thus a minority rule, the Second Circuit relied on the fact that Congress had intended a broad meaning for the word "debt," that the Code defined debt as a "right to payment," and that restitution created a right to payment since COAP had a right to receive and enforce payment of the restitution obligation. App. to Pet. at 34A–43A, 45A–47A. The court explained that the Code's legislative history revealing Congress to have stated that "[t]he bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension," referred primarily to the

exemption of criminal actions from the automatic stay, *see* 11 U.S.C. § 362(b)(1), not to the definition of "debt." App. to Pet. at 43A–45A. The court added that the existence of the automatic stay exemption and of a specific exemption from discharge for fines and penalties, *see* 11 U.S.C. § 523(a)(7), demonstrated that "Congress drew such lines as it thought appropriate to grant or deny criminals the benefits of the bankruptcy laws," and that the majority line of cases had simply "impermissibly reordered the priorities established by Congress." App. to Pet. at 44A–45A. The court sought to distinguish four federal court of appeals cases that held or suggested that restitution is nondischargeable on the ground that in those cases the restitution obligation arose or would have arisen after bankruptcy and thus could not have constituted a "debt" under 11 U.S.C. § 727(b). App. to Pet. at 41A–43A. Finally, the court determined that the exemption from discharge in 11 U.S.C. § 523(a)(7) for a "penalty . . . payable to and for the benefit of a governmental unit . . . [that] is not compensation for actual pecuniary loss" did not apply. Ap. to Pet. at 37A–42A. The court reasoned that the phrase "not compensation for actual pecuniary loss" referred to obligations that where wholly non-compensatory and excluded those that were partly compensatory. App. to Pet. at 41A. Thus the court could find that even though restitution represented a "penalty . . . payable to and for the benefit of a governmental unit," it did not fit within the § 523(a)(7) exemption from discharge because it was at least partly compensatory in nature. App. to Pet. at 41A–42A.

Judge Mansfield concurred in a separate opinion. App. at 53A–54A. He wrote that the court had reached an accurate but "unfortunate result." According to Judge Mansfield, the effect of the court's decision in many instances would be to "stultify and render useless criminal restitution payments as a means of punishing persons convicted of felonies." Judge Mansfield expressed his fear that "[t]he convicted criminal will simply use bankruptcy to escape the obligation to make criminal restitution payments ordered by the court." In closing, Judge Mansfield urged Congress to remedy 'this

unfortunate loophole" by amending 11 U.S.C. § 523(a)(7) to make criminal restitution payments non-dischargeable in bankruptcy.

Apparently because of the importance of the question presented[2] and the apparent conflict among the circuits,[3] this Court granted certiorari.

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[2] This case represents a sequel to *Ohio v. Kovacs*, 105 S. Ct. 705 (1985), which held that the monetary costs of a state-obtained injunction requiring a debtor to clean up a hazardous waste site constituted a debt in bankruptcy. The resolution of the issue in this case will have a significant impact on the ability of federal and state governments to fashion punishment that meets the crime. *See* Brief of Amicus Curiae States; Brief of National Governors' Association, et al., as amici curiae in Support of Petitioners.

[3] The Fifth, Seventh, and Ninth Circuits have held that a prior bankruptcy discharge of a debt created by the debtor's criminal fraud does not prevent a federal criminal court from later ordering the defendant to make restitution to the fraud victim in the amount of the loss. *United States v. Carson*, 669 F.2d 216, 217 (5th Cir. 1982); *United States v. Alexander*, 743 F.2d 472, 474, 480 (7th Cir. 1984); *United States v. Roberts*, 783 F.2d 767 (9th Cir. 1985). The Third, Fifth and Eleventh Circuits have all held that absent extraordinary circumstances a federal court should not enjoin a state criminal proceeding that might result in a restitution order requiring the defendant to pay back a discharged debt, *In re Davis*, 691 F.2d 176 (3d Cir. 1982), or a debt that may be discharged at the conclusion of pending bankruptcy proceedings. *McDonald v. Burrows*, 731 F.2d 294, 297-99 (5th Cir.), *cert. denied*, 105 S. Ct. 173 (1984); *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982). The Second Circuit attempted to distinguish these decisions on the ground that the restitution orders there represented nondischargeable post-petition debts under 11 U.S.C. § 727(b); Pet. at xviii, whereas in the present case the restitution obligation arose well before bankruptcy. These other Courts of Appeals, however, did not limit their decisions to post-petition restitution and instead suggested that Congress never intended to permit the discharge of any criminal restitution, whenever imposed. *See, e.g. United States v. Alexander*, 743 F.2d at 480 ("The bankruptcy proceeding is largely unconcerned with criminality"); *Barnette v. Evans*, 673 F.2d at 1251 ("The purpose of bankruptcy is to protect those in financial, not moral, difficulty").

SUMMARY OF ARGUMENT

I.A. Criminal restitution is not a debt within the meaning of the Bankruptcy Code. The Code defines "debt" as a liability on a claim and a "claim" as a right to payment. Criminal restitution does not confer a right to payment on the crime victim, who has no right to enforce the restitution order. Nor does it give a right to payment to the court or probation system, since they have no right to retain or assign the restitution payments. Criminal restitution is part of the punishment for a crime, not a mere monetary obligation to a creditor.

B. By the time of the passage of the Code in 1978, the courts had carved from the concept of bankruptcy debts an exception for criminal sanctions. Since Congress in 1978 did not specifically alter this exception, this Court must presume that it sought to maintain it. Indeed, the only salient expression of Congress in the legislative history of the Code was its statement that "the bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension."

C. The opposite conclusion, that criminal restitution is a bankruptcy debt, would contravene fundamental notions of public policy. It would mean that a federal court could nullify enforcement of a valid final judgment of a state court in violation of the principles of federalism articulated in *Younger v. Harris*, 401 U.S. 37 (1971). And it would create the absurd result that a person could commit a criminal act that benefits the criminal or damages others financially and at the same time leaves the state without any viable means to make the criminal pay back his gain or repair the damage.

II. Alternatively, even assuming criminal restitution is a debt, it is excepted from discharge by 11 U.S.C. § 523(a)(7). This provision makes nondischargeable "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit [that is] not compensation for actual pecuniary loss." The Court of Appeals agreed that restitution is a "penalty . . .

payable to and for the benefit of a governmental unit." And although restitution has compensatory consequences, it in essence is "not compensation for actual pecuniary loss." This point is especially true when one construes this phrase in light of the policy underlying the Code against the creation of a means whereby a criminal can escape punishment.

ARGUMENT

A CRIMINAL RESTITUTION ORDER IS NOT DISCHARGEABLE AS A DEBT IN BANKRUPTCY

I. A CRIMINAL RESTITUTION ORDER IS NOT A "DEBT"

The concept of criminal restitution has a history "older than the English legal tradition as a whole." *United States v. Florence*, 741 F.2d 1066, 1067 (8th Cir. 1984). As a condition of probation in Connecticut and elsewhere, *see* Conn. Gen. Stat. § 53a-30(a)(4); 18 U.S.C. § 3651, 43 Stat. 1259–60 (1925); 18 U.S.C. A. § 3563(b)(3) (1985), restitution constitutes "an authorized mode of mild and ambulatory punishment . . . intended as a reforming discipline." *Korematsu v. United States*, 319 U.S. 432, 435 (1943). Restitution, moreover, "undoubtedly serves traditional purposes of punishment" because the obligation to restore a crime victim's property "vindicat[es] society's interest in peaceful retribution." *United States v. Brown*, 744 F.2d 905, 909 (2d Cir.), *cert. denied*, 105 S. Ct. 599 (1984). "While recompense to the victim is a laudable consequence of restitution, the focus of any probation regime is on the offender." *United States v. Carson*, 669 F.2d at 217. *Accord* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 932, 937 (1984); Brief of Amicus Curiae States, part I.

A. Statutory Considerations

The principal question in this case is whether restitution constitutes a "debt" within the meaning of the Bankruptcy Code. This question arises because § 727(b) of the Code discharges a qualified debtor "from all *debts*," subject to the exceptions to discharge enumerated in 11 U.S.C. § 523 and discussed later in this brief. 11 U.S.C. § 727(b); Pet. at xviii

(emphasis added). Section 524(a)(1), moreover, voids any judgment that represents a determination of the personal liability of the debtor "with respect to a *debt* discharged under section 727." 11 U.S.C. § 524(a)(1); App. to Br. at 1A (emphasis added). Finally, § 524(a)(2) operates as an injunction against the commencement or continuation of an action "to collect, recover or offset any such *debt* as a personal liability of the debtor." 11 U.S.C. § 524(a)(2) (emphasis added); App. to Br. at 1A.

When, as here, the resolution of a federal question turns on the meaning of a statute and the intention of Congress, this Court looks first to the statutory language and then to the legislative history if the statutory language is unclear. *Blum v. Stenson*, 465 U.S. 886, 896–97 (1984). The task of a federal court is "to interpret the words of . . . statutes in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternate interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

The Bankruptcy Code defines "debt" as a "liability on a claim," 11 U.S.C. § 101(11), and a "claim," in pertinent part, as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal equitable, secured, or unsecured." 11 U.S.C. § 101(4)(A); Pet. at v. Criminal restitution does not qualify as a "debt" or "claim" since neither the crime victim nor the state court system has such a "right to payment."[4]

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[4] The Code also defines a "claim" as a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(4)(B); Pet. at v–vi. As discussed later, it was under this definition that this Court found a claim and debt to exist in *Ohio v. Kovacs*, 105 S. Ct. at 708. The respondent in this case has never asserted that restitution gives rise to this sort of claim and the court below did not address the matter.

1. The Court of Appeals essentially agreed that a crime victim has no "right to payment" of restitution, referring to the prevailing view of the bankruptcy courts to that effect and discussing only whether COAP has such a right. App. to Pet. at 36A–37A, 46A–48A. *See also In re Pellegrino*, 42 B.R. 129, 132–33 (Bankr. D. Conn. 1984); App. to Pet. at 13A–14A. This view is unquestionably correct. In Connecticut, as elsewhere, a crime victim has no right to determine the restitutionary amount, no absolute right even to testify at a restitution hearing, no right to appeal a restitution determination he deems inadequate, and no right to enforce payment. *See In re Pellegrino*, 42 B.R. at 132; App. to Pet. at 12a; Conn. Gen. Stat. § 53a-30(a)(4) (providing that "the amount [of restitution] and the manner of performance" shall be fixed by "the court"); App. to Br. at 6A. *Accord United States v. Brown*, 744 F.2d at 910 (applying federal law); *In re Johnson*, 32 B.R. 614, 616 (Bankr. D. Colo. 1982) (applying Colorado law). A crime victim is a beneficiary of restitution, but he has no legal right to obtain it.

2. Nor does the state court or probation system in imposing or collecting restitution hold a "claim" or "right to payment." Under Connecticut law, a sentencing court may suspend a prison sentence, impose probation, and order as a condition of probation the payment of restitution "in an amount [the defendant] can afford to pay or provide in a suitable manner, for the loss or damage caused thereby." Conn. Gen. Stat. §§ 53a-29, 53a-30(a)(4); App. to Br. at 6A. Criminal defendants ordered to make restitution send their payments to COAP, which is an agency within the judicial department, Conn. Gen. Stat. § 54-103a, and COAP, in turn, sends these payments to the crime victim. App. to Pet. at 12A, 51A. COAP officers monitor compliance with the restitutionary order and may apply to the sentencing court for an arrest warrant or notice to appear, or may make a warrantless arrest, in the event of a suspected violation of probation. Conn. Gen. Stat. § 53a-32(a); App. to Br. at 7A. If after a hearing the state establishes a violation of probation, the court may modify or

enlarge the conditions of probation or it may revoke probation and order the defendant incarcerated for any length of time up to the term of the suspended sentence. Conn. Gen. Stat. § 53a-32(b); App. to Br. at 8A.

These facts alone, wholly apart from the other factors discussed below, make it apparent that the conclusion of the Court of Appeals that COAP has a "claim" and "right to payment" strains these terms too far. The same is true if one expands the inquiry to include the sentencing court. While the sentencing court can set the amount of restitution and ultimately modify or revoke probation for nonpayment, and COAP can receive payments in the first instance, neither the court nor COAP can retain these payments. Neither can assign the obligation. And neither judicial agency stands in the shoes of the ordinary creditor. As explained, the purpose of restitution is not to compensate the victim, and certainly not to compensate the court system, but rather to impose a form of punishment on the offender. *United States v. Carson, supra;* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis, supra.* The immediate genesis of a restitution obligation is not the creation of monetary indebtedness but rather the adjudication of criminal guilt beyond a reasonable doubt. *United States v. Brown,* 744 F.2d at 909. When the government orders restitution it acts not as a creditor but in the "separate realm of the administration of the criminal laws." *134 Baker Street, Inc. v. Georgia,* 47 B.R. 379, 381 n.1 (N.D. Ga. 1984).

This conclusion does not differ when, as here, the victim is a governmental agency and thus when the state, in a collective sense, retains the restitutionary payments. For purposes of determining the bankruptcy status of restitution this Court must consider the victim governmental agency as a separate entity from the state court system, as has the bankruptcy court in Connecticut. *In re Pellegrino,* 42 B.R. at 134; App. to Pet. at 16A. Any other approach would prove anomalous. It would mean that restitution might not qualify as a dischargeable debt when the debtor steals from a

a private victim, because the state has no right to retain the payments, but that restitution might become a dischargeable debt when a person steals from the state and must make restitution payments retained by an arm of the government. In terms of their ability to enforce restitution, the victims of a crime against the government—ultimately the people—cannot have fewer rights than does a private victim. While the state is not a true "creditor" in any restitution case, the resolution of the issue certainly cannot turn on whether a state agency other than the court system retains the restitution payments.

3. The position that criminal restitution is not a "debt" that creates a "right to payment" squares fully with and in fact derives support from this Court's recent decision in *Ohio v. Kovacs*, 105 S. Ct. 705 (1985). *Kovacs* held that the monetary costs of a state-obtained injunction requiring a debtor to clean up a hazardous waste site represented a bankruptcy debt. Although the issue in *Kovacs* was whether Ohio had a claim within § 101(4)(B), which refers to a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment," and not, as here, whether the state had a simple "right to payment" under § 101(4)(A), a "right to payment" is literally a component of a § 101(4)(B) claim and this Court specifically held that the debtor's obligation to Ohio gave rise to such a right. 105 S. Ct. at 708–11; Pet. at v–vi. Nevertheless, the difference between *Kovacs* and the appeal at bar is clear. It is no less than the difference between a civil case and a criminal case. This Court has frequently emphasized "society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran v. Burbine*, 106 S. Ct. 1135, 1144 (1986), and the " 'legitimate and compelling state interest' in protecting the community from crime." *Schall v. Martin*, 104 S. Ct. 2403, 2410 (1984). In a variety of contexts this Court or Members thereof have adverted to the primacy of the criminal law. *See Younger v. Harris*, 401 U.S. 37, 55 n.2 (Stewart, J., concurring) ("A state's decision to classify conduct as criminal provides some

indication of the importance it has ascribed to prompt and unencumbered enforcement of the law"); *In re Johnson*, 167 U.S. 120, 126 (1897) ("The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest"). Indeed, the *Kovacs* Court attempted to make clear that its holding did not extend to criminal cases:

> It is well to emphasize what we have not decided. First, we do not suggest that Kovacs' discharge will shield him from prosecution for having violated the environmental laws of Ohio or for criminal contempt for not performing his obligations under the injunction prior to bankruptcy. Second, had a fine or monetary penalty for violation of state law been imposed on Kovacs prior to bankruptcy, § 523(a)(7) forecloses any suggestion that his obligation to pay the fine or penalty would be discharged in bankruptcy.

105 S. Ct. at 711. Although this language extends literally only to fines and penalties and implicitly treats them as nondischargeable debts under § 523(a)(7) rather than as nondebts under § 101(11), it nonetheless plainly indicates this Court's view of the Bankruptcy Code as having minimal application to criminal judgments. *Kovacs* thus provides considerable support for the conclusion that criminal restitution is not a bankruptcy debt. *See also* Brief of National Governors' Association, et al., as amici curiae in Support of Petitioners, part II.A.

4. The respondent will no doubt point to the language of § 523(a)(7) providing for an exception to discharge "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit" and argue that the Code refers to fines and penalties, and thus implicitly restitution, as "debts." This argument is resourceful but

ultimately unpersuasive. In the first place it appears from an examination of the remainder of § 523(a)(7), *see* Petition at xv, and the pertinent discussion of the Senate Judiciary Committee Report on the then-proposed Bankruptcy Code, both of which discuss only tax-related matters, that Congress in enacting § 523(a)(7) intended to address the status of civil tax penalties, not criminal sanctions.[5] Second, the exception stated in subsection (a)(7), like only two other exceptions to discharge among the nine enumerated in § 523(a), uses the language "to the extent such debt is for . . . . " *See also* 11 U.S.C. §§ 523(a)(5)(A), 523(a)(9); Pet. at xiv, xvi. It thus leaves entirely open whether a penalty such as criminal restitution is to any extent a debt.

In this respect subsection (a)(7) resembles its predecessor, § 57j of the 1898 Bankruptcy Act. 11 U.S.C. § 93j (repealed 1979); App. to Br. at 4A. *See In re Cox*, 33 B.R. 657, 658 (Bankr. M.D. Ga. 1983). Section 57j provided that:

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[5] The Senate Report provides:

> Paragraph (7) makes nondischargeable certain liabilities for penalties including tax penalties if the underlying tax with respect to which the penalty was imposed is also nondischargeable (sec. 523(a)(7)). These latter liabilities cover those which, [sic] but are penal in nature, as distinct from so-called "pecuniary loss" penalties which, in the case of taxes, involve basically the collection of a tax under the label of a "penalty." This provision differs from the bill as introduced, which did not link the nondischarge of a tax penalty with the treatment of the underlying tax. The amended provision reflects the existing position of the Internal Revenue Code [Title 26] (Rev. Rul. 68-574, 1968-2 C.B. 595).

S. Rep. No. 989, 95th Cong. 2d Sess. 79 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5865. Although the paragraph seems to be missing a line, the Report clearly reveals the Senate Judiciary Committee's intention that § 523(a)(7) address the dischargeability of civil tax penalties such as those authorized in 26 U.S.C. § 6651 et seq. Thus construed, § 523(a)(7) focuses on an issue that had generated much litigation and uncertainty under the 1898 Bankruptcy Act. *See* 3 *Collier on Bankruptcy* ¶ 57.22[2], [2.1] (14th ed. 1977).

> Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law.

Although the language of § 57j suggests that penalties owing to the United States or to any State were "debts," many courts interpreting the 1898 Act had held or stated that criminal fines and penalties were in fact not debts. *See Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *Parker v. United States*, 153 F.2d 66, 71 (1st Cir. 1946); *In re Abramson*, 210 F. 878, 880 (2d Cir. 1914); *In re Moore*, 111 F. 145, 149–50 (W.D. Ky. 1901); *People v. Washburn*, 97 Cal. App. 3d 621, 158 Cal. Rptr. 822, 824–25 (1979); *People v. Mosesson*, 78 Misc. 2d 217, 356 N.Y.S.2d 483, 484–85 (Sup. Ct. 1974). Thus both § 57j and § 523(a)(7) concern those fines or penalties that qualify as "debts," but neither has purported to determine what fines or penalties fit within that category. As this Court has stated, "a section of statute should not be read in isolation from the context of the whole Act and . . . in interpreting legislation [this Court] 'must not be guided by a single sentence or member of a sentence but [should] look to the provisions of the whole law, and to its object and policy.' " *Richards v. United States*, 369 U.S. 1, 11 (1962) (quoting *United States v. Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850)). Congress defined "debt" in § 101(11). Section 523(a)(7) is not a provision defining "debt" but rather one creating an exception to discharge. Any argument that § 523(a)(7) reveals the intent of Congress to resolve the question of whether criminal restitution is a bankruptcy debt is one that wrenches § 523 out of context and overlooks other considerations found in the Code and its purposes. *Richards v. United States, supra.*

5. It is true, as the Court of Appeals emphasized, that Congress intended to create the broadest possible definition of the terms "debt" and "claim." App. to Pet. at 37A–39A, 42A. But this Court "interpret[s] the words of . . . statutes in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization, supra.* This Court long ago stated that the purpose of the bankruptcy laws is to "convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the *honest* debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon *business misfortunes.*" *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554–55 (1915) (emphasis added). "The various provisions of the Bankruptcy Act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act." *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934). It is thus fully appropriate to interpret the term "debt" as broadly as possible to relieve the honest debtor from his misfortunes. At the same time it would be highly inappropriate and destructive of Congressional purposes to construe the term "debt" to allow a criminal to escape punishment.

B. Historical Considerations

The normal rule of statutory construction is that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755, 759–60 (1986). By the time of the passage of the Bankruptcy Code in 1978, the courts had made clear that criminal sanctions with monetary consequences did not represent bankruptcy debts. The absence of any evidence that Congress in 1978 intended to change this prevailing view thus indicates that Congress in fact had no intent to change it.

1. As early as 1846 this Court, in *Spalding v. New York ex rel. Backus*, 45 U.S. (4 How.) 21 (1846), summarily affirmed a decision of a New York state court that had held that a fine for criminal contempt was not a debt within the bankruptcy law. Other courts, with near unanimity, later followed suit. A federal district court ruled in 1901 that a fine for a substantive criminal offense did not constitute a debt, reasoning that "[t]he provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed." *In re Moore*, 111 F. 145, 150 (W.D. Ky. 1901). *Contra In re Alderson*, 98 F. 588 (D. W. Va. 1899). *See also* 11 U.S.C. § 1(14), 30 Stat. 544 (1898) (repealed 1979) (defining "debt" under the 1898 Act as "any debt, demand, or claim provable in bankruptcy.") In a 1914 case holding that a civil penalty for violation of a state agriculture law did not create a provable bankruptcy debt the Second Circuit observed that "bankrupts who have violated laws passed for the public good cannot escape punishment by going into bankruptcy." *In re Abramson*, 210 F. 878, 880 (2d Cir. 1914). Citing *Spalding*, the First Circuit noted in 1946 that, while a fine for civil contempt might qualify as a debt, a fine for criminal contempt would not: "It was not in the contemplation of Congress that the federal bankruptcy power should be employed to pardon a bankrupt from the consequences of a criminal offense, whether the criminal contempt be against the authority of a state or federal court." *Parker v. United States*, 153 F.2d 66, 71, 72–73 (1st Cir. 1946). And as recently as 1967 in a case in which a debtor claimed that nonmonetary agricultural sanctions imposed by the federal government violated the Bankruptcy Act the Second Circuit remarked that "governmental sanctions are not regarded as debts even when they require monetary payments" and cited the First Circuit and district court precedents to that effect. *Zwick v. Freeman*, 373 F.2d 110, 116 (2d. Cir.), *cert. denied*, 389 U.S. 835 (1967). This body of case law prompted the following conclusion in the 1975 edition of Collier on Bankruptcy: "It is almost generally accepted that the liability for a fine or penalty is not dischargeable, if for no other reason than the imperative

necessity of enforcing criminal sanctions enacted for the public welfare." 3A Collier on Bankruptcy ¶ 63.12 (14th ed. 1975). (footnote omitted).[6]

Restitution cases decided under the Bankruptcy Act of 1898 proved no exception to this trend. A New York state court, relying on the principle that "[a] bankruptcy proceeding is civil in nature and is intended to relieve an honest and

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[6] Although this passage refers to criminal sanctions as not dischargeable and does not precisely refer to them as nondebts, the 1898 Bankruptcy Act contained no specific exception to discharge for fines and penalties, *see* 11 U.S.C. § 35a (Bankruptcy Act § 17a) (repealed 1979); App. to Br. at 3A, and thus the passage in Collier at a minimum suggests that the courts had devised ways to exempt criminal fines and penalties from bankruptcy notwithstanding the absence of any clear language in the Act authorizing them to do so. In 1984 Collier put the matter in these terms:

> The Bankruptcy Act made no specific provision concerning the dischargeability of fines and penalties due to a governmental unit, but certain principles became well settled in this respect. Fines for violation of law, and forfeiture were not provable and therefore held to be not dischargeable. Generally, fines and penalties were not affected by discharge.

3 Collier on Bankruptcy ¶ 523.17 (15th ed. 1984) (footnotes omitted).

As mentioned earlier, § 57j of the Act provided for the disallowance of debts owing to the United States or any state for a penalty or forfeiture. 11 U.S.C. § 93j (repealed 1979); App. to Br. at 4A. The concept of allowance under the Act referred to acceptance of the claim by the courts. The courts, however, could only allow what were called "provable" debts. A provable debt, as defined in § 63a of the Act, 11 U.S.C. § 103a (repealed 1979); App. to Br. at 4A, was one that, among other things, represented a fixed liability evidenced by a judgment or instrument in writing. Since the courts could only allow or disallow a claim if the creditor had first proved it, the reference in § 57j to the disallowance of penalties and forfeitures was not a provision making these obligations nondischargeable but rather one that served only to disallow those limited types of penalties, such as tax penalties, that could be proved in the first place. 3 Collier on Bankruptcy ¶¶ 57.02, 57.22 (14th ed. 1977). In fact, disallowed but provable debts were discharged pursuant to 11 U.S.C. § 35a (Bankruptcy Act § 17a) (repealed 1979); App. to Br. at 3A. As Collier points out in the paragraph just quoted, however, "[f]ines for violation of law, and forfeiture were not provable and therefore held not to be dischargeable."

unfortunate debtor of debts and to permit him to begin his financial life anew," concluded that "[a] discharge has no effect whatsoever upon a condition of restitution in a criminal sentence." *People v. Mosesson*, 78 Misc. 2d 217, 356 N.Y.S.2d 483, 484–85 (Sup. Ct. 1974). A second New York court cited this language favorably in a case in which the debtor sought an injunction against a pending criminal prosecution. *People ex rel. Auerbach v. Topping Bros.*, 79 Misc. 2d 260, 359 N.Y.S.2d 985, 987–88 (Crim. Ct. 1974). Relying in part on these New York precedents, a California appellate court similarly ruled that "[a] condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt nor a debtor/creditor relationship between the persons making and receiving restitution." *People v. Washburn*, 97 Cal. App. 3d 621, 158 Cal. Rptr. 822, 825 (1979).

2. With the exception of this last California case, which came down on October 11, 1979, eleven days after the new Code took effect, *see Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 n.1 (1982), Congress in enacting the Bankruptcy Code was presumptively familiar with the conclusion of these cases that criminal sanctions were not bankruptcy debts. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696–97 (1979).[7]

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[7] Congress was also obviously aware that federal law had authorized restitution as a condition of probation since 1925. *See United States v. Brown*, 744 F.2d at 911 (citing 43 Stat. 1259, 1260 (1925) (codified as revised at 18 U.S.C. § 3651)).

Congress in considering and passing the Bankruptcy Code of 1978 did absolutely nothing to upset the settled view of the courts that criminal sanctions were not debts. Congress had very different purposes in mind. The major purpose of the bill was "the modernization of the bankruptcy laws." H.R. Rep. No. 595, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5965. Substantively the new Code sought to deal with the widespread adoption of the Uniform Commercial Code in the 1960's, the vast spread of commercial credit, and the lack of uniformity in the law concerning business reorganizations. H.R. Rep. No. 595, 95th Cong. 2d Sess. 3–5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5965–66. Procedurally the Code served to replace a strained and somewhat unregulated bankruptcy referee system with the creation of federal bankruptcy courts and federal bankruptcy judges. *Id.; see also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. at 52–56. Nothing in the materials discussing the passage of the Code in 1978 even remotely suggests that Congress sought to tamper with the prevailing rule of the courts that criminal sanctions with monetary consequences did not constitute bankruptcy debts. *Cf. Bryan v. Itasca County*, 426 U.S. 373, 380–81 (1976) ("provision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of Pub. L. 280 . . . . In marked contrast in the legislative history is the virtual absence of expression of congressional policy or intent respecting § 4's grant of civil jurisdiction to the states").

3. Not only did Congress register no dissatisfaction with the judicially created criminal law exception to the definition of debt, but it affirmatively expressed its approval of the underlying policy that had spawned this exception. The House Report on the 1978 bill makes clear the position of Congress that "[t]he bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy." H.R. Rep. No. 595, 95th Cong., 2d Sess. 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News

6299. It is true, of course, as the Court of Appeals emphasized, that this statement appears not in the legislative history of the Code sections defining "debt" and "claim" but rather in the explanation of the 11 U.S.C. § 362(b)(1) exception to the automatic stay for "the commencement or continuation of a criminal action or proceeding against the debtor." 11 U.S.C. § 362(b)(1); Pet. at ix; App. to Pet. at 44A–46A. But the Court of Appeals erred in concluding that this statement provides no indication of an intention to exclude obligations arising out of criminal activities from the term "debt." App. to Pet. at 44A. First, the fact that there exists an express criminal law exception to and accompanying legislative history regarding the automatic stay in no way undermines the inference of a similar exception to the definition of "debt," since the judicially created criminal law exception to "debt" had become firmly established by 1978 whereas "in enacting § 362 in 1978, Congress significantly broadened the scope of the automatic stay . . . [and] it was necessary for Congress to limit this new power expressly." *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. at 761. Second, one cannot reasonably assume that Congress intended to exempt criminal proceedings from the automatic stay and at the same time provide for the partial invalidation of criminal proceedings by discharge of a restitution order. No useful purpose would be served by allowing the continuation of a criminal prosecution only to nullify in part its result. Moreover, discharge of a criminal restitution order—an order imposed after a court has found a person guilty of a crime beyond a reasonable doubt—has little to do with the goal of providing distressed debtors "relief from financial over-extension." In short, the statement of Congress that the bankruptcy laws are not "a haven for criminal offenders" expressed a general

principle applicable to the bankruptcy scheme and fully supports an interpretation interpretation of "debt" that would exclude criminal monetary obligations.[8]

Congress thus acted in 1978 in full view of a judicially created criminal law exception to the concept of bankruptcy debts. If Congress had desired to change this rule of law, "it [would have] ma[d]e[ ] that intent specific." *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. at 759–60. It did not do so. The only available expression in the legislative history suggests the unwillingness of Congress to extend the relief available under the Bankruptcy Code to persons subject to criminal sanctions.

C. Public Policy Considerations

1. This Court should always strive to interpret an Act of Congress in accordance with general public policy. *See Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. at 762 (construing the Bankruptcy Code in conformance with "repeated congressional emphasis on its 'goal of protecting the environment against toxic pollution' "). Contrary to this approach, the decision below, insofar as it holds that a state criminal restitution order is a bankruptcy debt, conflicts frontally with the general doctrine in public policy, enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), that federal courts, including

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[8] Criminal obligations are apparently not the only implied exception to the term "debt." As part of his remarks upon introduction of the Senate amendment to the bankruptcy reform act proposed by the House, Senator DeConcini observed that the term "debt" does not include a policy loan made by an insurance company. To have made an express exception to the term "debt" for such loans, according to Senator DeConcini, "would have required elaboration of other legal relationships not arising by a liability on a claim." 124 Cong. Rec. 33992 (statement of Sen. DeConcini), *reprinted in* 1978 U.S. Code Cong. & Ad. News 6507. Senator DeConcini did not specify any of the "other legal relationships," but his statement clearly suggests that several exist.

bankruptcy courts, should not interfere with pending criminal prosecutions in the states. *See Barnette v. Evans*, 673 F.2d at 1251-52. As the *Younger* court stated, "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, [should] always endeavor[ ] to do so in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. at 44. The interpretation given the Bankruptcy Code by the Court of Appeals dramatically compromises the objectives of the *Younger* doctrine by allowing a federal bankruptcy court to nullify the enforcement of a valid final judgment of a state criminal court. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 599 (1975) (applying *Younger* to attempts to enjoin enforcement of state civil nuisance judgment). One cannot easily imagine that this result furthers "the purposes Congress sought to serve," *Chapman v. Houston Welfare Rights Organization, supra*, or that it reflects, in the words of the Court of Appeals, the "priorities established by Congress" in enacting the bankruptcy laws.

The respondent argued in opposition to certiorari that *Younger* principles do not apply in this case because the Connecticut Superior Court ordered a stay of probation revocation proceedings during the pendency of this federal litigation. Br. in Opp. at 14-15. The fact that the parties and the state court chose to defer to federal resolution of the issue presented in this case, however, hardly eliminates the concerns underlying *Younger*. On the contrary, the stay issued by the state court serves to highlight the direct confrontation between two independent judicial systems that might otherwise have arisen.

Were this Court to rule that restitution is dischargeable in bankruptcy, then in every subsequent case in which a person ordered to make restitution in state court petitioned for bankruptcy, a federal court would have to assume the role of enjoining state court enforcement of state criminal law. Such a situation represents precisely the type of undue "interfere[nce] with the legitimate activities of the States" that

Younger condemned. Thus *Younger* principles remain fully applicable here and they should inform this Court's interpretation of the Bankruptcy Code.[9]

2. The construction of the Code by the Court of Appeals also produces decidedly absurd results, as the concurring opinion essentially acknowledged. The ruling below allows Robinson to steal from the government and pay off her creditors with the money she stole. The court's decision allows for the growth of a revolving door system of justice whereby a defendant convicted of a crime in state criminal court can merely walk across the street to federal bankruptcy court and escape justice.

This Court should not presume that Congress intended such an absurd result. *Griffin v. Oceanic Contractors, Inc., supra.* Congress specifically provided for the exception from discharge of certain taxes, fraudulently-created debts, alimony and child support payments, debts arising from willful injury, tax fines and penalties, student loans, and debts incurred as a result of drunk driving. 11 U.S.C. § 523(a); Pet. at x–xvii. While Congress apparently characterized these obligations as debts not subject to discharge rather than obligations not

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[9] The *Younger* doctrine does not, of course, leave a debtor helpless in the occasional case in which the animus of the state prosecution is "neither punishment nor a sense of public duty, but rather [a desire] to obtain payment of a dischargeable debt either by an order of restitution or by compromise of the criminal charge upon payment of the civil obligation." *In re Taylor,* 16 B.R. 323, 326 (Bankr. D. Md. 1981). In such a case the debtor can normally challenge the bona fides of the prosecution in state court, as the Third and Eleventh Circuits have explained. *In re Davis,* 691 F.2d at 178; *Barnette v. Evans,* 673 F.2d at 1252. But if state remedies are ineffective or it is evident that the state prosecution is brought in bad faith or for purposes of harassment, *In re Davis,* 691 F.2d at 178, then a bankruptcy court can and should assume jurisdiction pursuant to 11 U.S.C. § 105(a) and enjoin the participants in the state prosecution. *Id.* at 177 & n.5; *In re Wise,* 25 B.R. 440, 441–42 (Bankr. E.D. Va. 1972); Pet. at vi. In the case at bar, the state court imposed restitution well before the petition in bankruptcy and Robinson has never suggested that the state did not bring its criminal prosecution against her in good faith.

qualifying as debts, these obligations, unlike criminal sanctions, were expressly made nondischargeable debts by § 17a of the 1898 Bankruptcy Act and did not carry with them at the time of the drafting of the Code in 1978 a history of treatment by the courts as nondebts. 11 U.S.C. § 35a (repealed 1979). App. to Br. at 3A. Thus it was logical for Congress to continue this approach by excluding these civil obligations from bankruptcy by way of the exceptions to discharge in 11 U.S.C. § 523 while at the same time excluding criminal sanctions from bankruptcy by leaving untouched their historic status as nondebts. It would have reflected little logic, however, for Congress to have exempted such civil obligations as child support from bankruptcy while allowing a bankrupt to discharge criminal restitution.

The respondent's answer is that the state need only file a timely objection to discharge pursuant to § 523(a). which the state did not do in this case. This proposal cannot possibly comport with the Congressional design for exempting criminal sanctions from discharge. As a general matter, when a state court has already adjudicated an individual guilty of a crime beyond a reasonable doubt, state prosecutors should not then have to shoulder the added burden of learning the intricacies of bankruptcy law, filing a complaint in federal court, paying filing fees, participating in discovery, engaging in motion practice, and, in some instances, proving their case over again, simply to ensure that a convicted criminal does not escape the punishment that the criminal court imposed. *See* Bankruptcy Rules 4004(d), 4005, 7001 et seq. As this Court stated in discussing the rule of prosecutorial damages immunity: "if the prosecutor could be made to answer in court each time . . . a person charged him with wrong-doing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976).

The fact that the debtor will have pleaded guilty or that a jury will have found the debtor guilty of an offense beyond a reasonable doubt will not necessarily lessen the

prosecution's burden in bankruptcy court of proving the state's claim to restitution. Even assuming that the criminal court's finding of guilt will have res judicata effect in bankruptcy court, the description of the crime in the state court judgment—e.g. forgery or issuing a bad check, *see* Conn. Gen. Stat. §§ 53a-128, 53a-138—may not precisely match the phraseology of the Bankruptcy Code's exceptions to discharge—e.g. "fraud" or "larceny," *see* 11 U.S.C. § 523(a)(4)—thus requiring the prosecution to present at least some additional proof that the state restitution order arises from a debt excepted from discharge by the Code. More significantly, perhaps, with respect to the amount of restitution, the state will undoubtedly have to prove its case from the start. A sentencing court in imposing restitution is not bound by the amount of the defendant's gain charged in the indictment or found by the jury but instead may order restitution in an amount that, based on its discretion and the usually flexible procedures applicable at sentencing, reflects the victim's loss and otherwise satisfies the government's interest in deterrence, retribution, and rehabilitation. *See, e.g., United States v. Lemire*, 720 F.2d 1327, 1352-53 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2678 (1984); *State v. Gunther*, 39 Conn. Supp. 504, 466 A.2d 804, 808 (App. Sess. 1983). *See generally United States v. Grayson*, 438 U.S. 41, 49 (1978); *Williams v. New York*, 337 U.S. 241 (1949). In Connecticut and elsewhere a sentencing court, especially as part of a plea bargain, may also base a sentence on reliable information concerning charges that the government has dropped or not prevailed upon. *See United States v. Davies*, 683 F.2d 1052 (7th Cir. 1982); *State v. Huey*, 199 Conn. 121, 126-27, ____A.2d____ (1986). These sentencing determinations will not have res judicata effect. *United States v. Brown*, 744 F.2d at 910. Hence in all these cases the same prosecutor who obtained a conviction in criminal court, either by plea or by trial, may then have to prove the government's entitlement to the full amount of restitution in a second or at least more formal trial in bankruptcy court. Depending on when bankruptcy proceedings commenced, this second trial might take place several years after the criminal proceedings, thus exacerbating the

prosecutor's burden of proof and conflicting with the strong policy favoring finality of criminal judgments. *See Engle v. Isaac*, 456 U.S. 107, 127 (1982). The true irony is that while the double jeopardy clause normally prohibits a second criminal trial after judgment, *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), the respondent's proposal would in effect require one.

The respondent's proposal, moreover, even if workable in some cases, would merely narrow the existing loophole without eliminating it. Although an exception to discharge exists for debts created by "fraud . . . embezzlement, or larceny," 11 U.S.C. § 523(a)(4), and "willful and malicious injury by the debtor to another entity or to the property of another entity," *id.* § 523(a)(6), no exception exists that would prevent the discharge of restitution in cases involving common state crimes such as reckless manslaughter, Conn. Gen. Stat. § 53a-56(a)(1), criminally negligent homicide, *id.* § 53a-58, reckless assault with a deadly weapon, *id.* § 53a-60(a)(3), negligent assault with a deadly weapon, *id.* § 53a-61(a)(3), reckless burning, *id.* § 53a-114, bribery, *id.* § 53a-147, receiving kickbacks, *id.* § 53a-161c, cruelty to animals, *id.* § 53-247, or professional gambling, *id.* § 53-278b. *See, e.g.*, S. Rep. 989, 95th Cong., 2nd Sess. 79, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5865 (exception to discharge for debts created by "willful or malicious" conversion or injury does not encompass acts done in "reckless disregard" of consequences).[10]

The respondent may reply, as she did in opposition to certiorari, that the existence of gaps and crevices in her proposal means merely that in those instances the policies established by Congress in the Bankruptcy Code prevail over the interests of the criminal justice system. Br. in Opp. at 13–14. According

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[10] The respondent's proposal assumes not only that restitution is a debt, but also that restitution, when imposed, for example, in a larceny case, is a "debt . . . for . . . larceny" within the terms of § 523(a)(4) rather than a separate obligation that supersedes the original larceny debt to the victim. *See In re Brown*, 39 B.R. at 823 (leaving this question open).

to the respondent, then, the fact that a state has no recourse to prevent the discharge of, for example, a $100,000 criminal restitution order imposed as a result of a criminal's reckless burning is just the price society must pay for the existence of the bankruptcy laws.

The State of Connecticut takes a different view. We believe that criminals, not society, should pay for crime. Surely Congress in enacting the Bankruptcy Code did not disagree. Undoubtedly it recognized "society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine, supra.* Thus the wholly inadequate scheme devised by the respondent for enforcing restitution orders jeopardized by bankruptcy cannot possibly reflect "the priorities established by Congress." The construction of the Code most consistent with its language, its history, and with public policy is that restitution is not a debt.

II. ALTERNATIVELY, EVEN IF A CRIMINAL RESTITUTION ORDER IS A DEBT, IT IS EXCEPTED FROM DISCHARGE BY § 523(a)(7)

Section 523(a)(7) of the Code provides an exception to discharge "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." Unlike the exceptions to discharge for debts arising from false pretenses, larceny, or willful injury to person or property, § 523(a)(7) contains no time limits on its effectiveness. 11 U.S.C. § 523(c); Pet. at xviii.

The Court of Appeals held that, although restitution is a "penalty" and in this case was "payable to and for the benefit of a governmental unit," restitution was at least partly compensatory and thus did not satisfy the subparagraph (a)(7) requirement that the penalty "not [be] compensation for actual pecuniary loss." The court focused on the fact that a Connecticut court can order an offender to make restitution in

an amount "he can afford to pay or provide in a suitable manner, *for the loss or damage caused thereby*," Conn. Gen. Stat. § 53a-30(a)(4); App. to Br. at 6A (emphasis in court's opinion), and that the restitution order here of $9,932.95 equaled the precise amount of the loss. App. to Pet. at 48A–53A.

The petitioners believe that this analysis does not accurately characterize the nature of criminal restitution, either in this case or in general, and that it does not interpret the Code in accordance with the intent of Congress. Thus even if this Court should find that criminal restitution constitutes a debt, it should also find that it falls within the § 523(a)(7) exception to discharge.[11]

1. The restitution order in this case was unusual in that, while the state court nominally ordered restitution in the amount of the $9,932.95 loss to the state, the total payments Robinson would have had to make at the rate of $100.00 per month through the end of her probationary period would have amounted only to $5,800.00. Thus under no circumstances would the state have received full compensation for its loss. In any event, even in a case in which the restitutionary amount more clearly matched the pecuniary loss, the conclusion that restitution represents compensation would not follow. The equation of the restitutionary amount with the pecuniary loss means only that the punishment fits the crime. Certainly it would make little sense for a sentencing court to order restitution in an amount wholly unrelated to the magnitude of the

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[11] Whether restitution in a case involving a private victim is "payable to and for the benefit of a governmental unit" is a question not before the Court. It does not appear, however, that the position advanced above would necessarily lead to the result that restitution is nondischargeable in cases involving a governmental victim but dischargeable in cases involving a private victim. The Code defines "governmental unit" to include not only a "department, agency, or instrumentality of the United States [or] a State," but also the "United States" and the "State" itself. 11 U.S.C. § 101(21). Restitution even in a private victim case is "payable to and for the benefit of a governmental unit" because the probationer initially makes payments to the state, App. to Pet. at 12A, and because restitution in all cases "vindicat[es] society's interest in peaceful retribution." *United States v. Brown*, 744 F.2d at 909.

victim's loss. If restitution is to "vindicat[e] society's interest in peaceful retribution," *United States v. Brown*, 744 F.2d at 909, then the restitution order will necessarily bear a reasonable relationship to the amount of the loss.

2. Moreover, restitution, whether equal to the amount of the loss or not, is "not compensation for actual pecuniary loss" within the meaning of § 523(a)(7). While compensation may represent a consequence of restitution, it is not truly its purpose. *United States v. Carson, supra.* "Although restitution may appear to share with the civil law the aim of compensation, close examination reveals that its principal goal is not its ability to make the victims whole, but rather its utility as a corrective device." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis, supra.* Restitution in this sense resembles liability for the costs of prosecution, which several lower federal courts, apparently without disagreement, have held excepted from discharge under § 523(a)(7) despite the superficially compensatory character that costs may possess. *In re Zarzynski*, 771 F.2d 304 (7th Cir. 1985); *In re Cox*, 33 B.R. 657 (Bankr. M.D. Ga. 1983).

The resolution of whether § 523(a)(7) can include restitution within its exception to discharge must, of course, take into account the available aids to construction of the Code. Thus this Court must read § 523(a)(7) in view of the fact that Congress in enacting the bankruptcy laws sought primarily to "relieve the honest debtor from the weight of oppressive indebtedness," *Williams v. United States Fidelity & Guaranty Co., supra*, that it had no intention of creating "a haven for criminal offenders," H.R. Rep. No. 595, *supra*, that a federal court discharge of a state criminal restitution order would constitute undue federal interference in the administration of criminal justice in the states, *Younger v. Harris, supra*, and that the discharge of criminal restitution would create the absurd result in this case and many others that a state cannot make a criminal pay for her crime in the most meaningful manner. *Chapman v. Houston Welfare Rights Organization, supra.* Viewing the matter in this light, this Court can and, if it

reaches the issue, should interpret § 523(a)(7) to prevent the discharge of a sentence of criminal restitution.[12]

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[12] Significant doubt exists as to whether the state could revoke Robinson's probation if this Court found restitution to represent a dischargeable debt. Section 525 of the Code makes it illegal for a governmental unit to "deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . a person . . . solely because such bankrupt . . . has not paid a debt that is dischargeable." 11 U.S.C. § 525(a); App. to Br. at 2A. This section codifies the result in *Perez v. Campbell*, 402 U.S. 637 (1971), which held that a state cannot refuse to renew a driver's license solely because the driver had not paid a tort judgment discharged in bankruptcy. Moreover, "[t]he section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination." S. Rep. No. 989, 95th Cong., 2d Sess. 81, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5867. *Cf. Beardon v. Georgia*, 461 U.S. 660 (1983) (prohibiting a state from revoking probation solely because of probationer's bona fide inability to pay fine or restitution unless no other method will satisfy the state's penological interests).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted.

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In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioners,

v.

CAROLYN ROBINSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO BRIEF OF PETITIONERS
(Containing Statutes Involved in addition to those reprinted in the Appendix to the Petition)

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STATUTES INVOLVED
(in addition to those reprinted in the Appendix to the Petition)

11 U.S.C. § 524. Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the injunction against the commencement or continuation of an action, the employment of process, or an act to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523 or 1328(c)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

11 U.S.C. § 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 35a. (Bankruptcy Act § 17a) (repealed 1979). Dischargeability of Debts—Debts Not Affected by Discharge

a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy. *Provided, however,* That a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this Act: *And provided further,* That a discharge in bankruptcy shall not release or affect any tax lien; (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings

in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; (5) are for wages and commissions to the extent that they are entitled to priority under subdivision a of section 64 of this Act; (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment; (7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation; or (8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision.

11 U.S.C. § 93j (Bankruptcy Act § 57j) (repealed 1979)
Proof and Allowance of Claims

j. Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interests as may have accrued on the amount of such loss according to law.

11 U.S.C. § 103a (Bankruptcy Act § 63a) (repealed 1979)
Debts Which May Be Proved

a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) costs taxable against a

bankrupt who was at the time of the filing of the petition by or against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) an open account, or a contract express or implied; (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments; (6) an award of an industrial-accident commission, body, or officer of any State having jurisdiction to make awards of workmen's compensation in case of injury or death from injury, if such injury occurred prior to adjudication; (7) the right to recover damages in any action for negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy; (8) contingent debts and contingent contractual liabilities; or (9) claims for anticipatory breach of contracts, executory in whole or in part, including unexpired leases of real or personal property: *Provided, however,* That the claim of a landlord for damages for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after bankruptcy, plus an amount equal to the unpaid rent accrued, without acceleration, up to such date: *And provided further,* That in the case of an assignment of any such claim for damages, the court shall, in determining the amount thereof, examine the circumstances of the assignment and the consideration paid or to be paid therefor, and may allow the claim of the assignee in such amount, subject to the provisions of the foregoing proviso of this clause (9), as will be fair and equitable.

Conn. Gen. Stat. Sec. 53a-30. Conditions of probation and conditional discharge. (a) When imposing sentence of probation or conditional discharge, the court may, as a condition of the sentence, order that the defendant: (1) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment; (2) undergo medical or psychiatric treatment and remain in a specified institution, when required for that purpose; (3) support his dependents and meet other family obligations; (4) make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance; (5) if a minor, (A) reside with his parents or in a suitable foster home, (B) attend school, and (C) contribute to his own support in any home or foster home; (6) post a bond or other security for the performance of any or all conditions imposed; (7) refrain from violating any criminal law in the United States, this state or any other state; (8) reside in a residential community center or halfway house approved by the commissioner of correction, and contribute to the cost incident to such residence; (9) satisfy any other conditions reasonably related to his rehabilitation. The court shall cause a copy of any such order to be delivered to the defendant and to the probation officer, if any.

(b) When a defendant has been sentenced to a period of probation, the office of adult probation may require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) which are not inconsistent with any condition actually imposed by the court.

(c) At any time during the period of probation or conditional release, after hearing and for good cause shown, the court may modify or enlarge the conditions, whether originally imposed by the court under this section or otherwise, and may extend the period provided the original period with any extensions shall not exceed the periods authorized by section 53a-29. The court shall cause a copy of any such order to be delivered to the defendant and to the probation officer, if any.

Conn. Gen. Stat. Sec. 53a-31. Calculation of periods of probation and conditional discharge. Interruption of period of sentence. Sentence of imprisonment may satisfy sentence of probation or conditional discharge. (a) A period of probation or conditional discharge commences on the day it is imposed, except that, where it is preceded by a sentence of imprisonment with execution suspended after a period of imprisonment set by the court, it commences on the day the defendant is released from such imprisonment. Multiple periods, whether imposed at the same or different times, shall run concurrently.

(b) Issuance of a warrant or notice to appear for violation pursuant to section 53a-32, shall interrupt the period of the sentence as of the date of such issuance until a final determination as to the violation has been made by the court.

(c) In any case where a person who is under a sentence of probation or of conditional discharge is also under an indeterminate sentence of imprisonment, or a sentence authorized under section 18-73 or 18-75, imposed for some other offense by a court of this state, the service of the sentence of imprisonment shall satisfy the sentence of probation or of conditional discharge unless the sentence of probation or of conditional discharge is revoked prior to parole or satisfaction of the sentence of imprisonment.

Conn. Gen. Stat. Sec. 53a-32. Violation of probation or conditional discharge: Arrest; procedure. (a) At any time during the period of probation or conditional discharge, the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation or conditional discharge, or may issue a notice to appear to answer to a charge of such violation, which notice shall be personally served upon the defendant. Any such warrant shall authorize all officers named therein to return the defendant to the custody of the court or to any suitable detention facility designated by the court. Any probation officer may arrest

any defendant on probation without a warrant or may deputize any other officer with power to arrest to do so by giving him a written statement setting forth that the defendant has, in the judgment of the probation officer, violated the conditions of his probation. Such written statement, delivered with the defendant by the arresting officer to the official in charge of any correctional center or other place of detention, shall be sufficient warrant for the detention of the defendant. After making such an arrest, such probation officer shall present to the detaining authorities a similar statement of the circumstances of violation. Provisions regarding release on bail of persons charged with a crime shall be applicable to any defendant arrested under the provisions of this section. Upon such arrest and detention, the probation officer shall immediately so notify the court or any judge thereof. Thereupon, or upon an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant shall be informed of the manner in which he is alleged to have violated the conditions of his probation or conditional discharge, shall be advised by the court that he has the right to retain counsel and, if indigent, shall be entitled to the services of the public defender, and shall have the right to cross-examine witnesses and to present evidence in his own behalf.

(b) If such violation is established, the court may continue or revoke the sentence of probation or conditional release or modify or enlarge the conditions, and, if such sentence is revoked, require the defendant to serve the sentence imposed or impose any lesser sentence. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by reliable and probative evidence.

Conn. Gen. Stat. Sec. 53a-33. Termination. The court or sentencing judge may at any time during the period of probation or conditional discharge, after hearing and for good cause shown, terminate probation or conditional discharge.